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No. 73-1492

In the Supreme Court of the United States

OCTOBER TERM, 1973

FRANK J. GILL and JAMES FAHEY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Frank J. Gill and James Fahey pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming their convictions and sentences.

Opinion Below

The opinion of the Seventh Circuit is reported at 490 F.2d 233, and is printed as Appendix A to this petition. There was no opinion from the trial court below.

Jurisdiction

The decision of the United States Court of Appeals for the Seventh Circuit was filed on December 28, 1973. A timely petition for rehearing en banc was denied on March 6, 1974. (Appendix B) This petition is filed within 30 days of that date The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254(1).

Questions Presented for Review

1. Whether the Hobbs Act, 18 U.S. Code, Sec. 1951 is applicable in a situation where police officers take money under color of authority from a tavern owner who does not receive his supplies from out of state but from wholesale liquor dealers who in turn receive their supplies from out of state?

2. Whether there was any proof that the "commerce" was of an interstate character as required by the statute where the evidence was supplied not by facts but by a government-sponsored theory, unsupported by proof.

3. Whether 18 U.S. Code, Sec. 1951 can be literally interpreted, even though its legislative history does not contemplate a case such as at bar, and even though it conflicts with another federal statute, to-wit: 27 U.S. Code, Sec. 121 and with the 21st Amendment to the Constitution of the United States.

4. Whether a court may, without doing violence to the 6th Amendment right to trial by jury, direct a verdict as to an essential element of the case, to-wit: proof of interstate commerce, where the issue of the nature of the commerce was in dispute?

5. May a court, consistent with the elements of fair trial, refuse to instruct on an essential element of the case—the Hobbs Act definition of "commerce"—and merely advise the jury that the issue as to whether or not "commerce" was involved was resolved—when in fact, it was not?

6. May the government frame an indictment charging a substantive violation of the law in one count and perjury in a second count where the alleged perjury consists merely in denying to the Grand Jury the accusation of the substantive count?

7. Considering the closeness of the case and petitioners' direct head-on denial and refutation of the government charges, were petitioners denied the right to fair trial by jury when the court gave an expanded "dynamite" Allen-type charge to a jury which did not announce they were deadlocked or hung and which had already deliberated 10 hours on the simple factual disputes involved?

And was it not coercive to remind the jurors a second time of their oaths to act as jurors and to remind them a second time in the conclusory instruction that they should not consider the nature of punishment, but that such was reserved to the court only.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the Constitution of the United States:

> Sections 8, Clause 3. Regulation of commerce
>
> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ."

Section 2 of the Twenty-First Amendment to the Constitution of the United States:

> SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 1951, Title 18 U.S.C.A. provides in pertinent part:

> § 1951. Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> • • •
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce

between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

* * *

Title 27 U.S.C.A., Section 121:

§ 121. State statutes as operative on termination of transportation; original packages. All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such state or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. (Aug. 8, 1890, c. 728, 26 Stat. 313.)

Statement of the Case

Petitioners, Frank J. Gill and James Fahey were indicted in Count 1 for violation of the Hobbs Act in that while a member of the Chicago police department he, together with Fahey, obstructed, delayed and affected commerce, as that term is defined in 18 U.S.C. 1951, by extortion in that they obtained $300 by inducing fear of economic harm to a tavern owner under color of official right. (App. 1)[1]

In Count 2, defendant Gill alone was charged with making a false material declaration to the grand jury on February 22, 1972 when he was asked whether he had

[1] "App." refers to printed Appendix filed with brief of Gill in court below as #72-1689.

ever asked any person for money while in the performance of his duties as a police officer, in violation of 18 U.S.C. 1623. (App. 3-4)

In Count 3, defendant Fahey was charged with making a false material declaration before the grand jury on May 16, 1972 when he denied that he received any money from a Constantine Sanichas, a/k/a "Dino", in or about July 1971. (App. 4-5)

Pretrial motions for severance pursuant to Rules 8(b) and 14 of F. R. Cr. P. were denied. Said motions sought a severance from the misjoinder of Counts 2 and 3 with Count 1; in the alternative, defendants moved for severance from each other. (App. 5-6)

The testimony was in sharp dispute. The government witnesses stated that defendants failed to effectuate the arrest of a tavern owner for selling beer to a boy under the age of 21 and released the boy because defendant Gill accepted the tavern owner's offer of a bribe not to be arrested. (A: 70-71)[2] Gill's evidence was to the effect that he released the boy and did not arrest the tavern owner because the boy was nearly 21 and that he was sent for the beer by his father who was ill. With the factual issues thus sharply delineated, with motive and bias for falsification on the part of the tavern owner being demonstrated (A: 107-8) and with defendants demonstrating their long, honorable and creditable work performance with the police department, the jury was unable to reach a verdict after

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[2] The entire record as filed in the Court of Appeals consists of the Original Record and the Transcript of Proceedings as follows:
Vols. A & B, pp. 1-316
Vols. 1 to 4, pp. 1-711.
The Tr. references will be referred to as A: p. ....., and 1. p. .....

the first 10 hours of deliberations, whereupon the court delivered unto the jury an expanded Allen "dynamite" charge, which instruction was specifically directed by the Seventh Circuit in *United States* v. *Brown*, 411 F.2d 930 (7 Cir. 1969) not to be given.

The trial judge added to the forbidden "dynamite" charge by singling out two other instructions, although the court had on the previous day advised the jury not to single out any specific instruction but to consider the instructions as a whole. (4: 676) Yet, the court singled out two instructions which, by their nature, compelled the verdict against the defendant. Those specially singled-out instructions were that the jury was reminded of the oaths as jurors they took when sworn in and that the nature of punishment should not be a consideration in determining the issues—that punishment was for the judge to decide. (4: 706; 708-9)

Statement of Facts

Stojan Kovacevic was the licensee of a tavern and liquor store called the Chicago-Oak Liquors at 5940 W. Chicago Avenue, Chicago, Illinois. It was stipulated that the Anheuser-Busch Co. had its branch office at 4841 S. California, Chicago, Illinois. Mr. Ed Kapps, the manager, would testify his company distributed beer in the Chicago area and that all of the beer so distributed is received by his company from various breweries all located outside Illinois. (A: 3-4) In 1971 his company distributed beer on a regular basis to the Chicago-Oak Liquor Store. Similarly, Ed Skovie, manager of Better Brands of Illinois, Inc. would testify that his company distributed beer to taverns and liquor stores in the Chicago area and that all of the beer his company distributes in Chicago is received by his company from breweries outside of Illinois; and that in 1971 his company distributed beer on a regular basis

to the Chicago-Oak Liquor Store. (A: 5-6) Walter Blake, manager of Old Rose Distributing Company, Chicago, Illinois would state his company's business is distributing various types of liquor to taverns and liquor stores in the Chicago area and that all of the liquor which his company distributes comes from distributors and distilleries outside of Illinois. Further, that during 1971 his company distributed various quantities of liquor on a regular basis to the Chicago-Oak Liquor Store. (A: 4-5)

Stojan testified that sometime in the first part of July, 1971, a Chicago police officer Reddon told him he sold six cans of beer to a minor and that Reddon brought the young man into the store. Shortly after that, defendants Lt. Gill and Sgt. Fahey came into the liquor store. Gill talked to him alone in the middle of the liquor store. The lieutenant told him that he would have to appear in the office of the Liquor Commissioner. Then Kovacevic asked the lieutenant if something could be done about it, to which the lieutenant said, "what do you mean;" whereupon Kovacevic said to the lieutenant, "I am going to give you $150;" the lieutenant said he would take $500, to which Kovacevic rejoined that he would give $300, to which the lieutenant agreed. (A: 70-71)

He did not see Lt. Gill any more. (A: 78-9)

Constantine Sanichas, known by his nickname, Dino, testified he was indicted for extortion and granted immunity. He was present in the Chicago-Oak Liquor-Tavern in the first part of July. He recognized officer Fahey whom he had known as a patron in a restaurant where the witness worked some three or four years ago. Fahey told him the owner was caught selling liquor to a minor. Fahey said that for $500 the owners wold be given a pass. Fahey walked outside and then the witness spoke to one of the owners. Only he and the owner were present. He told the owner the officer wanted $500 but the owner said he could

not pay it, but would pay $300. (B: 267-8) Later, Fahey came back into the tavern, spoke to the witness, and Fahey told him to get the money and meet him on the corner of Chicago and Austin Avenues. Fahey then left. The witness then spoke to the owner and said that the officer would accept the $300. The owner gave him the $300 and the witness left the tavern and walked to Chicago and Austin Avenues, where he met Fahey and handed him $300. Four or five weeks later, Fahey gave him $40. (B: 273-6)

In December, 1971 he was interrogated by FBI agents and said he had no knowledge of anything that occurred in the tavern.

Evidence On Behalf of Defendants

Defendant Frank Gill testified he was with the Chicago police department for 17 years. In the first week of July 1971, he was a lieutenant assigned to Austin district police station and received an assignment to go to the tavern at 5940 W. Chicago Avenue. Sgt. Fahey drove him there. When he arrived at the tavern area, officer Reddon told him a boy 20 years of age purchased beer. Reddon showed him a driver's license which reflected that the boy was one month short of being 21. Gill went into the liquor store and talked to a man behind the counter who said that the driver's license was not the one which was shown him by the boy. During this time, the boy's father came upon the scene and defendant left the store and spoke to the father who said that his son had purchased the beer and that he sent the boy out for the beer because he had just come out of the hospital, and that his son was a student home from college and he had never been in trouble before.

He did not ask the owner for any money, nor did he have any conversation with him about money. He made a determination to give the owner of the store the benefit of

the doubt and determined that under the circumstances, the owner would not be arrested. He told Sgt. Fahey to tell the owner that no arrest would be made, but that if another violation occurred, he would be subject to arrest (2: 379-428)

Defendant James Fahey testified he was a Chicago police officer for 30 years. He drove Lt. Gill to 5940 W. Chicago Ave. in the early part of July, 1971. He met a man whom he knew as Dino in front of the tavern. He told Dino that the owner had sold to a minor, but they did not know what they would do. The father of the boy had come to the premises area and had spoken on the street with the lieutenant and with Fahey, after which the boy was released. Gill told Fahey to tell the store owner that he was going to give him a pass, but to be more careful in the future. He went into the tavern where he saw Dino in the doorway between the tavern and the liquor store. He told Dino that they were going to give the owner a pass and to tell the owner to be more careful. He denied he received any money from Dino or that he had a conversation with Dino about money or that he had ever given Dino $40. (2: 337-355)

The "Dynamite" Allen Instruction

The trial was commenced on June 21, 1972 and concluded on June 28, 1972. The jury started its deliberations at 12:15 p.m. on June 28 and at 10:00 p.m. were retired for the night, they not having reached a verdict. (4: 709) On the next day, June 29, 1972, the judge inquired of the foreman whether the jury had arrived as yet at a verdict. The foreman advised the court the jury had not reached a verdict, whereupon the court gave the following instructions (4: 706-9) to which defendant objected:

"The Court: All right. You may be seated.

The Court desires that you listen carefully to the further instructions which I am about to give you.

In your job of determining the facts, you are reminded that before each of you was accepted and sworn to act as a juror, you were asked questions regarding your competency, qualifications, fairness and freedom from sympathy or prejudice. Neither sympathy nor prejudice should play any part in your deliberations. On the faith of the answers that you gave, you were accepted as jurors by the parties. Therefore, those answers are as binding on each of you now as they were then, and should remain so until you are discharged from further consideration of the case.

Now, in a large proportion of cases, absolute certainty cannot be expected. The verdict should be the verdict of each individual juror and not a mere acquiescence in the conclusion of others. You should examine the questions submitted with proper regard and deference to the opinions of each other, and you should consult with one another and deliberate with a view to reaching an agreement if it can be done without violence to your individual judgment.

It is your duty to decide this case if you can conscientiously do so. In the course of deliberations, a juror should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous, but no juror should surrender his honest conviction as to the weight or the effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict.

Each of you must decide for yourselves, but only after an impartial consideration of the evidence with your fellow jurors. If a much larger number of jurors favor conviction, the smaller number of jurors should

consider the reasonableness of their doubt when it makes no impression upon the minds of the other jurors who are equally intelligent and impartial, and who have heard the same evidence.

If on the other hand a larger number of jurors favor acquittal, the smaller number of jurors should ask themselves whether they might not reasonably doubt the correctness of their judgment. Likewise, the jurors in a majority favoring a finding for either party should ask themselves whether they might not reasonably doubt the correctness of their judgment when it makes no impression upon the minds of the minority jurors equally intelligent and impartial as they are, and who have heard the same evidence.

If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of sometime. Any future jury must be selected in the same manner and from the same source as you have been chosen, and there is no reason to believe that this case could ever be submitted to 12 men and women more competent to decide it, or that the case can be tried any better or more exhaustively than it has been here, or that more or clearer evidence could be produced on behalf of either side.

In determining the guilt or the innocence of a Defendant, you should not give any consideration to the matter of punishment. This question is exclusively my responsibility.

You may now retire and reconsider the evidence in the light of these instructions. Take the jury back."

This Court should direct its Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit in the instant case for the following reasons:

REASONS FOR GRANTING THE WRIT

I. Relying on an uninterpretable definition of "commerce" under Title 18, U.S.C. §1951, the court below has effectively declared all retail outlets interstate commerce for the purpose of prosecution under that section, if any of the merchandise had ever been in "commerce". The decision in this case, finding the basic essential jurisdictional element sustained by any imaginable fiction is violative of the restrictive approach to be given penal statutes under the rules promulgated by all of this Court's opinions, and illogically interprets the intent of Congress in enacting the law.

II. This case presents an incursion of federal jurisdiction into the criminal jurisdiction of the states in contradiction of this Court's several recent admonitions against changing the federal-state balance enunciated most recently in United States v. Enmons, 93 S.Ct. 1007; United States v. Bass, 404 U.S. 336; Rewis v. United States, 401 U.S. 808.

Aside from the federal-state imbalance present in those cases, are the restrictions of the 21st Amendment, and of Title 27 U.S.C. § 121. This decision runs contra to the mandate of the amendment and of the statute, as well as the abstention policy of this Court.

III. Certiorari should be granted to prevent basic unfairness in the trial of criminal cases. A defendant may not adequately defend against an extortion charge, when his defense has been branded as perjury, against which he is compelled to simultaneously defend.

This principle was recognized by the Court of Appeals for the Seventh Circuit, simultaneous with denying relief

in this case on a gossamer distinction, certainly a distinction too flimsy to avoid a conflict of decision in the same circuit. On that conflict, too, certiorari should be granted.

IV. Failure of the trial court to instruct on request made, on the definition of "commerce" within the contemplation of the Hobbs Act. The failure or refusal of the court to instruct is in direct conflict with the decisions of this Court, and particularly United Brotherhood of Carpenters, etc. v. United States, 330 U.S. 395, Weiler v. United States, 323 U.S. 606, Bruno v. United States, 308 U.S. 287, and Screws v. United States, 325 U.S. 91, together with numerous decisions of other Courts of Appeals.

When, as happened here, the court erroneously instructed that the "commerce" element had been satisfied, it came into direct conflict with the Fifth Circuit in Mims v. United States, 375 F. 2d 135. A precise admonition by this Court proscribing a court finding on a jurisdictional element has not been, but should be, declared by this Court.

V. Since Allen v. United States, 164 U.S. 492, was decided by this Court seventy-eight years ago, it has spawned a myriad of conflicting decisions guided by the several courts of appeals. The Seventh Circuit is admittedly in conflict with the 1st, 5th, and 10th Circuits. A definitive statement by this Court on what would now qualify as an allowable "shot-gun" charge, if any, is timely and appropriate.

An expansion on the Reasons follows hereinafter:

I.

In what has now become a series of cases before this Court, beginning with *United States* v. *Walter Moore,* (C.A.

7, No. 72-1813, decided on an opinion Order of the Seventh Circuit, not to be published, and pending in this Court as *Moore* v. *United States*, No. 73-980), and *United States* v. *DeMet*, 7 Cir., 486 F.2d 816 (now pending before this Court as *DeMet* v. *United States*, No. 73-989), this case concerning Chicago Police Officers accepting moneys from local tavern or liquor store operators, which moneys were given to induce a breach of their official duties[3] presents the same federal jurisdictional question.

The question is whether a purely local retail outlet for intoxicants can supply the necessary link to "regulation of commerce," as defined in Article I, Section 8, Clause 3 of the Constitution to make the Hobbs Act applicable. The tenuous link[4] is made more tenuous by Illinois law, which prohibits direct sales of intoxicants manufactured out-of-state to any retailer (See particularly Chap. 43, § 115 and 122(e), Ill. Rev. Stats.), but requires deliveries to a distributor within Illinois (and within certain restricted areas within the State), who holds the intoxicants in warehouses until furthered to the retailer on his order made to the

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[3] Compare *United States* v. *Miller*, 4 Cir., 340 F. 2d 421 and *United States* v. *Kubacki*, E.D.Pa., 237 F. Supp. 638.

[4] A bribe is given to police officers to overlook a minor local rule deviation. A fiction is created that the minor bribe might have been part of the assets of the business. The assets of the business might have been used to purchase from local distributors, intoxicants manufactured out-of-state. For a more detailed analysis, see Petition for Certiorari in *DeMet* v. *United States*, No. 73-989, now pending. No proof of actual *affect* on commerce is required, but only theorized. Compare *United States* v. *Bass*, 404 U.S. 336, where the government honestly admitted no intent to show affect on commerce. No affect was shown here, but under the government's attenuated theory, there conceivably might have been "affect", so proof of "affect" was excused.

distributor. The retailer, too, must be in an area within the state, designated to be serviced by the distributors.

Rejecting any suggestions that the intoxicants had come to rest after interstate activity (these petitioners had been relying on this Court's decisions in *Brown* v. *Houston,* 114 U.S. 622, 632 and *E. Ohio Gas Co.* v. *Tax Commission,* 283 U.S. 465, 471), the Court of Appeals found cases under the several labor laws, taxing laws and anti-trust laws to not validly operate on any restriction of the enforcement of the Hobbs Act, because "the Hobbs Act not only forbids extortion which interferes with interstate commerce but also extortion which affects interstate commerce. Congress' power to regulate interstate commerce is very broad." (App. *infra,* p. 4). This statement is bolstered by the Court of Appeals' reasoning that, under 18 U.S.C. §1951, Congress has seen fit to exercise its full power under the Commerce Clause (App. *infra,* p. 5).

That "full power", which is, in fact, only a power to regulate under the Constitution, assumes in this case—as in its forerunner Chicago Police cases—any rationale that can in any way, or upon any theory, create any tangential, however remote, reference to interstate commerce.

The Court of Appeals opines that "Section 1951 clearly contemplates a full application of the commerce power." (App. *infra,* p. 5). But it does not enlighten on what that "full application" is. Nor does the statute itself. It says, in essence, that "commerce" will be defined as "commerce" of districts, territories, or possessions, within or without those districts, territories, or possessions, between states; and "all other commerce over which the United States has jurisdiction." Title 18 U.S.C., §1951(b)(3). That, too, leaves the accused uninformed. Where may he look for "all other commerce over which the United

States has jurisdiction"? This case holds he may not look to the decisions of this Court, nor of other courts, interpreting "interstate commerce" under other laws of the United States. Precluded from relying on such decisions, there is no place for the citizen to go to understand what the law intends to do if a certain line is passed. He is not given the fair and clear warning required by this Court in interpreting penal statutes. *McBoyle* v. *United States*, 283 U.S. 25, 27; *United States* v. *Cardiff*, 344 U.S. 174. Indeed, we would have to attribute to the Congress an intention to reach future, uncertain conduct when it defined commerce in this Statute as "all other conduct over which the United States has jurisdiction."

If the Court of Appeals' interpretation is correct, virtually all local business and commercial activity in this country is subject to federal control under "commerce," because the inter-relation of businesses makes that result inevitable. In the giant step this case represents (under what one Judge has referred to as the "superclause"), it seems inevitable that the commerce clause will take over, with the same ubiquity, all criminal jurisdiction, with far-reaching changes in our criminal law, and in our federalism.

This Court must sense these impending and otherwise inevitable changes, as they have been reflected in *Windward Shipping (London) Ltd.* v. *American Radio Association*, 94 S. Ct. 959 and in *Edelman* v. *Jordan*, No. 72-1410, 42 L.W. 4419.

It is ironic that the author of the opinion (Luther Swygert, C.J.) sought to be reviewed herein has clearly expressed his regret that the "commerce" clause has been improperly expanded.

> "The author of this opinion stated a view in a prior case, *United States* v. *Amabile,* 395 F.2d 47, 54 (7th Cir. 1968), that is in opposition to those expressed by Judge Fairchild in *DeMet.* With reluctance, the author accepts Judge Fairchild's opinion in *DeMet* as the law of the circuit. *See* concurring opinion, Swygert, C.J., *United States* v. *DeMet,* sl. op. at pp. 10 and 11." (App. *infra,* p. 4, fn. 1)

In *Amabile,* to which he refers, Judge Swygert's dissent was expressed.

> "If a depletion of reserves is all that is necessary to show the requisite affect on commerce, then a threat of any kind to extract money made to a person who happens to operate a business engaged to any extent in interstate commerce comes within the statute's proscription. Under this rationale, a retail store owner, for example, would be afforded federal protection from extortion, regardless of the nature of the likely affect of the threat, simply because his stock of merchandise had in some measure moved in interstate commerce." 395 F.2d 47 at 55.

This case concerns a retail store owner, now federally protected, cited in the *Amabile* dissent as the conceivable extension of a basically fallacious rationale and as an extreme example.

In that dissent, Judge Swygert borrowed from Judge Hastie's dissent in *United States* v. *Stirone,* 262 F. 2d 571 (reversed on other grounds 261 U.S. 212), wherein Judge Hastie pointed out that local extortion is primarily the business of local or state government, and that the Hobbs Act is merely auxiliary, concluding that, "We should not be eager to stretch federal jurisdiction to cover doubtful cases offering only a tenuous or speculative theory of federal jurisdiction." (262 F. 2d at 579) Judge Hastie

also urged federal jurisdiction be clear before imposing federal sanctions in an area primarily of local concern.

Lately, this Court expressed identical sentiments in relation to the Hobbs Act. In *United States* v. *Enmons*, 93 S.Ct. 1007, this Court was explicit in enunciating the federal-state balance and in emphasizing that the federal government should not interfere where states had laws sufficient and effective to vindicate their criminal jurisdiction. (93 S. Ct. at 1015-1016) In the *Enmons* case, the applicability of the Hobbs Act was certainly more clear than here, for the Hobbs Act found its seeds, and indeed its birth, in an attempt to prevent anarchy under the guise of legitimate labor objectives; and *Enmons* was a labor case. We submit that this decision upsets the federal-state balance that this Court is obliged to secure.

Another consideration we would encourage is that, to our knowledge, no other municipal police force of consequence in the United States has been similarly attacked as intended targets of the Hobbs Act. Granting the East and West Coasts equal powers of perception and interpretation, we suggest that Middle West federal crime enforcement has stepped too far.

II.

As in *DeMet* v. *United States*, No. 73-989, now pending in this Court on Petition for Certiorari, these petitioners contend that, whatever the breadth of the Commerce Clause, it is significantly diminished regarding control of liquor traffic by the enactment of the 21st Amendment to the Constitution of the United States, and that limitation has been lucidly defined by Title 27 U.S.C. §121.

Unlike *DeMet* where the point was raised after briefing in the Court of Appeals, it was presented fully in this case to the Court.

In response thereto, the Court of Appeals' decision ignored Title 27 U.S.C. §121, and of the 21st Amendment said only:

> "Fahey raises the additional issue that the Twenty-first Amendment has precluded the enforcement of the Hobbs Act in this case since the amendment gave to the states the power to regulate traffic in intoxicants. Section 2 of the Twenty-first Amendment prohibits any state-restricted transporting or importing of liquor for use or delivery therein which crosses state lines. This state preemption in regulating liquor does not preclude the federal government from prohibiting extortion which affects interstate commerce under authority of the Commerce Clause." (App. *infra*, p. 5).

Being treated thus summarily, the reasons therefor are not immediately apparent. The first question is, can an amendment alter the pervasive commerce power granted by the Constitution. The answer to that is, that alteration is obviously what amendments to the Constitution are for, either to enhance or to curtail. (See the Sixteenth Amendment as a clear example of enhancement of power to tax.) What then does this amendment do? The Constitution, Article I, Section 8, Clause 3, gives to the Congress, so far as is pertinent, the right to pass laws to regulate commerce among the several states. This Court of Appeals by its above-quoted portion of the opinion recognizes that the Twenty-first Amendment allows the states to preempt the regulation of one class of commerce. We submit as to that class or commodity, the power to regulate given by the Constitution is withdrawn by the Amendment which has been consistently interpreted as returning to the states the power to regulate it.

Ultimately the question is, was it intended by the nation's founders, the authors of the Constitution and the

authors of the hard-fought amendments, that its meaning should be unclear. We are impressed by the strong dissent in *Hostetter* v. *Idlewild*, 377 U.S. 324,[5] which reviews the legislative history of the Twenty-first Amendment and particularly that portion credited to Senator Wagner:

> "Senator Wagner argued that giving the Federal Government even 'apparently limited power' would allow that power to be 'extended to boundaries now undreamed of and unsuspected' by those supporting the proposed Amendment."

Those legislators, carefully drafting the Twenty-first Amendment and withholding from the Federal Government even apparently limited power, would, we submit, be edified to know that its careful rejection of any concurrent power to regulate the commerce of intoxicants to be consumed within the state has been circumscribed, notwithstanding their valiant efforts. We submit that the Court of Appeals has now done indirectly that which Congress forbade be done directly. It has given to the Federal Government the power to regulate commerce in intoxicants, which the legislature clearly intended to, and did, withdraw from the Federal Government.

The Statute, Title 27 U.S.C. § 121, reinforces our contention, providing in pertinent part:

> "* * * All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State

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[5] The *Hostetter* case makes two exceptions to the pervasive control of liquor traffic by the States. They are where the liquor is destined for consumption (1) on a federal reservation and (2) outside the United States. The dissent resisted (2) where the liquor went through New York, feeling the 21st Amendment controlled.

> or Territory be subject to the operation and effect of the laws of such state or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory * * *"

Certainly the police powers of the State of Illinois are sufficiently pervasive to cover bribery or extortion relating to a public official. In the light of this, and the amendment, and the limiting federal statute, toleration of these prosecutions under the Hobbs Act constitutes the "unprecedented incursion into the criminal jurisdiction of the States," rejected by this Court in *United States* v. *Enmons*, 93 S.Ct. 1007, 1015. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *United States* v. *Bass*, 404 U.S. 336, 349. See also *Rewis* v. *United States*, 401 U.S. 808, 812.

III.

All of these Chicago Police Officer indictments brought under the Hobbs Act for "extorting" tavern and liquor store operators follow a similar pattern. The tavern operators for a specific Police District are induced by the promised protection of the government to "cooperate". Having secured that "cooperation" directed against the proposed defendant, the proposed defendant police officer is subpoenaed before the grand jury to confirm the evidence already had against himself, or to deny it. If confirmed, of course, he convicts himself. If denied, his indictment includes the perjury count. His denial will not be turned against the protected cooperator.

..

Another example of this type of procedure is before the Court in *Moore* v. *United States,* No. 73-980 of this Court.

The Fifth Amendment privilege is available only to the strongest minded, who must opt which of the dilemma's horns he will grasp. These defendants were, at the time of their grand jury appearance, subject to a rule of the Chicago Police Department under which they, or he, could be suspended or discharged for failure to testify before a grand jury. Thus, these appellants were faced with the prospect of either forfeiting their jobs or risking self-incrimination. Many, many policemen were, in fact, immediately suspended when the department "learned" they had invoked the privilege against self-incrimination before the grand jury.[6] The dilemma of these police officers was recognized by the United States Court of Appeals in its recent decision in *Confederation of Police* v. *Conlisk* (No. 73-1543 of that court), now pending on Petition for Writ of Certiorari as *Rochford* v. *Confederation of Police,* No. 73-1317 of this Court. In that case the Seventh Circuit struck down the rule as unconstitutionally depriving Chicago police officers of the privilege of self-incrimination when a criminal proceeding might follow. These petitioners faced their dilemma without the assurance of that decision. They faced their interrogation knowing they would conflict with a government-protected witness against them and the sure knowledge they would lose the source of their livelihood if they said nothing.

Accordingly these petitioners were joined in one indictment and charged together in Count I under Hobbs, and respectively in Count II (Gill) and Count III (Fahey) with false declarations under Title 18 U.S.C. § 1623.

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[6] The source of his knowledge, followed by immediate suspension, has never officially been identified.

Gill moved (adopted by Fahey) for severance one from the other for trial pursuant to Rule 8(b) of the Federal Rules of Criminal Procedure. The Court below took especial notice that the motion read in part "The defendant Gill [Fahey] consents to a trial of the charges contained in Counts I and II [III], but objects to a joint trial . . ." with the other petitioner. (App. *infra*, p. 8)

The Court of Appeals noted—almost as an aside—that "The motion also mentioned Rule 14, Fed. R. Crim. P." (App. *infra*, pp. 7-8)

The motion was denied.

The Court of Appeals, without regard to the "mentioning" of Rule 14, and holding the Rule 8(b) motion was untenable, nonetheless avoided a ruling on Rule 14, on the basis of the "consent" relative to Rule 8(b). More clearly, the Court of Appeals, finding the three counts properly joined under Rule 8(b) then continued:

> "This ruling, however, does not answer the question whether the joinder was so prejudicial that there should have been a severance under Rule 14. Gill contends that his trial on Count I should be severed from Count II; Fahey makes the same contention regarding Count I and Count III. They argue that it was prejudicial for the jurors to be aware of the fact that the grand jurors disbelieved each one's grand jury testimony denying involvement in the activity for which he was charged on the extortion count. They maintain that each defendant's credibility was impeached before he took the witness stand. We do not decide this important question, however, since in the motion for severance, filed by Gill and joined in by Fahey, Gill consented to being tried on Counts I and II and Fahey, by joining in the motion, consented to being tried on Counts I and III. Thus, they waived the very issue they now seek to present on appeal." (App. *infra*, p. 9)

In the context of this Court's admonitions against implied waiver, a question of magnitude arises as to whether the invoking of one form of relief—which is denied—can be interpreted as a waiver of an alternate form of relief, so as to foreclose review of the alternate, on the basis of the content of the other, on which relief was refused.

The question is further complicated by the *same* Court of Appeals' decision, handed down on the *same* day, involving testimony by the *same* government witness, as victim of the extortion, which held that Rule 14 would not tolerate the Counts being tried together. We refer to *United States* v. *Pacente*, 7 Cir., 490 F.2d 661 also decided Dec. 28, 1973, now pending on Petition of the government for Rehearing en banc.

We would adopt as our contention the holdings of that decision, with its particular reference to Rule 14 (after finding objections under Rule 8(a) and (b) inapplicable), the same Court of Appeals held:

> "More specifically, defendant argues that he was prejudiced by the joinder of the two counts since the petit jurors were aware that the grand jury found that he had lied when he denied having taken the June 10, 1971 check from Kovacevic.
>
> "* * * It is one thing for the petit jurors to believe that the grand jury concluded that probable cause existed that the defendant committed the substantive offense. It is quite another thing, however, for the petit jurors to know that the grand jurors—laymen like themselves—believed the defendant to have lied to them. Such knowledge serves to impair a defendant's ability to effectively defend himself on the substantive charge. In the event the defendant testifies concerning the substantive charge, the knowledge of the false declaration count has the effect of informing the petit jurors that the defendant's testimony is not

to be believed. Accordingly, the defendant is impeached as soon as he reaches the witness stand. On the other hand, in the event that defendant chooses not to take the stand the substantive offense is substantially reinforced by the addition of the false declaration count.

"Additionally, the joinder of the substantive count with the false declaration count tends to shift the burden of proof to the defendant who must prove that he did not lie to the grand jury. The problem, however, is that there is no way to confront and defend against the false declaration count." (490 F.2d at 663-4)

If the Court agrees—as we think it will—that on the basis of the making of a motion under Rule 8(b), where the relief is denied,[7] relief under Rule 14, also invoked, is not thereby waived, then the Seventh Circuit is in conflict with itself because *Pacente* and this case cannot be distinguished factually.

IV.

Where novel questions of Hobbs Act interpretation were involved, it was incumbent to instruct properly on the definition of "commerce" before the jury could realistically apply the facts to the case. Failure of the court so to instruct, as requested, is violative of petitioners' right to fair trial.

As petitioners were charged with obstructing, delaying and affecting "commerce as that term is defined in Title 18, U.S. Code, Section 1951, and the movement of alcoholic beverages and articles in such commerce, by extortion, as

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[7] This has some resemblance to the former suppression procedure, where interest or ownership had to be admitted, to be used later at trial, as the chance defendant took in invoking his Fourth Amendment rights. See *Simmons* v. *United States,* 390 U.S. 377, 394.

that term is defined in Title 18, U.S. Code, Section 1951 . . ." (App. 1), it was essential that the jury properly be instructed as to this definition. To allow the jury to speculate on the definition of "commerce" within the context of this case, in effect, directed a verdict to the jury on this point. "No matter how strong the evidence may be . . . there must be a charge to the jury setting out correctly . . ." the appropriate definition for the jury's guidance. *United Brotherhood of Carpenters, etc.* v. *United States,* 330 U.S. 395, 408 (1946). "A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction . . . the error is aggravated by the failure to give the correct charge upon request." *Id.* at 409.

The evidence as to interference with interstate commerce as required under Sec. 1951 is so strained and minimal as realistically to be non-existent. The proof was simply as follows:

The stipulated proof as to the source of liquor is as follows: An office manager of the Chicago Branch of Anheuser-Busch, 4841 South California Avenue, Chicago, Illinois stated (in the form of a stipulation) that his company purchases beer from breweries located outside of Illinois and then distributes the beer to various taverns and liquor stores in the Chicago area; and that in 1971 his company distributed beer on a regular basis to the Chicago-Oak Liquor Store at 5940 West Chicago Avenue, Chicago (A: 3-4). The general manager of Old Rose Distributing Company, Chicago, Illinois testified (by stipulation) that all of the liquor which his company distributes to taverns and liquor stores in the Chicago area comes from distributors outside of Illinois; and that during 1971, his company distributed various quantities of various whiskeys to the

store in question (A: 4-5); and the general manager of Better Brands of Illinois, Inc. located in Chicago, Illinois testified likewise (by stipulation) that his company delivered beer on a regular basis to the Chicago-Oak Liquor Store, which beer was purchased by his company from locations outside of Illinois. (A: 5-6).

Thus, the evidence shows that the beer and liquor came from out of Illinois, not directly to the Chicago-Oak Liquor Store, but went to various liquor distributing companies first. This is a requirement of the laws of Illinois. No retail liquor operator may purchase any beer or liquor except from a local liquor distributor.[8]

Thus, as between the Chicago-Oak Liquor Store and the local liquor distributors, the transactions between them were purely intrastate transactions, and not interstate at all. Not all commerce comes within the aegis of the Hobbs Act; for . . . " 'commerce' means commerce . . . between any point in a State, Territory, Possession, or the District of Columbia *and* any point outside thereof . . ." 18 U.S. Code 1951(b)(3).

Thus, when the court neglected to instruct as to the definition of commerce, the jury was left without an appropriate standard to determine whether the commerce was purely intrastate (as the evidence demonstrated it was) or interstate, in accordance with the statutory definition. It was clear from the stipulation that the beer and liquor had come to rest in Illinois before it was further distributed to local retail users.

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[8] See Chap. 43, Secs. 115(c)(d) and Sec. 121(e), of Ill. Rev. Stat. 1971. A local retailer of liquor may not obtain an importing distributor's license, and may not sell for resale. Moreover, an importing distributor may not sell at retail. Thus, by law, the local retailer may obtain his goods *only* from Illinois distributors.

Accordingly, the jury could have found the defendants not guilty if it had properly been instructed on this essential element.

And certainly the jury must have been perplexed when the court referred to the statute defining commerce, but then did not read the statute; for the court instructed the jury:

> "In order for the government to convict either of the defendants, Frank J. Gill, or James Fahey, of the crime charged in Count 1 of this indictment, they must prove as to each of them beyond a reasonable doubt: First, that the extortion was committed by the defendants as that term has just been defined for you in the statute;
>
> that the extortion was committed by the defendants knowingly, wilfully and unlawfully;
>
> and that the natural effect of carrying out the extortion threat as charged in the indictment would affect commerce *as that term also is defined in the statute.*" (4:682-3; emphasis added).

The court of appeals concluded:

> "It was not error for the judge to fail to define 'commerce' since the defendant had agreed that the liquor sold to Stojan had come from out of state. To define 'commerce' under 18 U.S.C. § 1951(b)(3) as defendants now argue would be a meaningless instruction since the jury was not called upon to make any factual determination about whether the shipment of liquor was interstate commerce. The only factual question in this regard was whether the commerce to which they had stipulated was affected by the extortion. The instructions fully covered this element of the crime." App. *infra,* p. 7; 490 F.2d 233, 238.

But, of course, the jury was called upon to determine whether there was any interference with or affect on com-

merce. Because of a lack of any instruction on this essential issue, the jury might have concluded that deliveries from the wholesale companies *in Chicago* to the retail taverns *in Chicago* was sufficient "commerce" to take it within the Act.

Under no circumstances could the court direct a verdict of guilty on any point for, "no matter how clear the evidence, they are entitled to have the jury instructed in accordance with the standards which Congress has prescribed. To repeat, guilt is determined by the jury, not the court. The problem is not materially different from one where the evidence against an accused charged with a crime is well-nigh conclusive and the court fails to give the reasonable doubt instruction. It could not be said that the failure was harmless error." *United Brotherhood of Carpenters, etc.* v. *United States,* 330 U.S. 395, 410.

See also *Weiler* v. *United States,* 323 U.S. 606; *Bruno* v. *United States,* 308 U.S. 287.

The court did instruct the jury that before it could find guilt it must find that extortion was committed "as that term has just been defined by you in the statute . . . and that the natural effect of setting out the extortion threat as charged in the indictment would affect commerce *as that term also is defined in the statute,*" (4: 682-3; emphasis added). The trial court instructed the jury as to the statutory definition of extortion; but as to "commerce" it improperly directed the jury to find that interstate commerce was involved. (4: 683-4) Defense counsel had properly objected to the government's offered Instruction #21 which proposed to advise the jury that "the parties have stipulated and agreed that commerce is involved in this case." (3: 521); counsel pointed out that there was no such stipulation anywhere in the record (3: 523).

It was plain error not to instruct on the statutory definition of commerce. And "where the error is so fundamental as not to submit to the jury the essential ingredient of the only offense on which the conviction could rest, I think it necessary to take note of it on our own motion." *Screws* v. *United States,* 325 U.S. 91, 107.

Certainly, the jury must have been perplexed when the trial court referred to the *statutory* definition of commerce "as that term also is defined in the statute," but did not read the statutory definition. As this Court stated, there are two essential elements to be alleged and proven, "interference with commerce and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government jurisdiction of this crime rests only on that interference." *Stirone* v. *United States,* 361 U.S. 212 at 218.

"In the final analysis it is not the parties who determine the charge the judge gives to the jury, the obligation rests squarely on the shoulder of the trial judge." *Williamson* v. *United States,* 332 F.2d 123 (5 Cir. 1962). The Seventh Circuit ruling in this connection in holding that failure to charge on the essential element is not error is in conflict with the holdings of the District of Columbia Circuit, *Byrd* v. *United States,* 342 F.2d 939, 941 (1965); the Fourth Circuit, *United States* v. *Hutchison,* 338 F.2d 991 (1964), the Fifth Circuit, 287 F.2d 443, 440 (1961) and *Bryan* v. *United States,* 373 F.2d 403 (1967), *Mims* v. *United States,* 375 F.2d 135, 148 (1967), the Sixth Circuit, *United States* v. *Ornstein,* 355 F.2d 222, 224 (1966), the Eighth Circuit, *United States* v. *Brandom,* 479 F.2d 830, 833, 834 (1972), the Tenth Circuit, *McBride* v. *United States,* 314 F.2d 75 (1963), and even decisions from its own circuit, *United States* v. *Raub,* 177 F.2d 312, 316 (1949).

The trial judge's influence on the jury is necessarily and properly of great weight and ". . . 'his lightest word or intimation is received with deference and may prove controlling' . . .", *Quercia* v. *United States,* 289 U.S. 466, 470 (1933).

Inasmuch as "An instruction deciding a material fact issue as a matter of law adversely to the accused is regarded as a partial instructed verdict of guilty prohibited by the rule just stated [that a court cannot direct a verdict of guilty in criminal cases even if the facts are undisputed]," *Mims* v. *United States,* 375 F.2d 135, 148 (5 Cir. 1967), certiorari should be granted to determine this issue, as this Court has not precisely spoken on this point before.

V.

Petitioners' constitutional right to a fair trial by an impartial jury was violated by the trial court's giving an expanded Allen charge. The Court of Appeals applied an improper standard in determining that the charge given was not prejudicial to petitioners. Since *Allen* v. *United States* was decided in 1896, there has spawned numerous progeny of different application amongst the circuits. The time is ripe for re-evaluation of *Allen;* and especially so, in the light of the coercive instruction in the case at bar.

The evidence in the case demonstrated a head-on-head accusation and denial, without any substantial corroboration on the part of the government. Thus, peculiarly, the issue of credibility was brought into play.

The trial commenced on Wednesday, June 21, 1972 at 2:00 P.M. (A: 1). Part of the final arguments were made on June 27 and were concluded on June 28, 1972. The court instructed the jury on the early morning of June 28, 1972 and the jury retired to deliberate its verdict at

about 12:15 P.M. on June 28, 1972. (4: 709) The jury deliberated for about ten hours on that day and then retired for the night. (4: 709).

The next morning, the court assembled the lawyers and advised that it was going to inquire from the jurors merely whether they had reached a verdict, and if they had not it was going to instruct the jury, giving a modified Allen charge. The court stated that "the record will show that both counsel object to the instruction that I propose to give to the jurors in the event that I am informed by the jury that they have not as yet arrived at a verdict." The jury was called in and asked if it had arrived at a verdict as yet; the foreman merely replied, "We have not, your Honor." (4: 706).

The testimony of the three main government witnesses was in direct conflict with that of the two defendants. The jury had learned that defendant Gill had been a member of the Chicago Police Department for sixteen years and had risen in rank from patrolman to detective to sergeant to lieutenant; that he had received many, many commendations for police work; that Sgt. Fahey had been a member of the Police Department for thirty years and that he had been promoted to the rank of sergeant and likewise received many commendations for police work. They had denied both in their testimony before the grand jury and in their trial testimony that they had either asked for or received any money from the government witnesses.

Stojan Kovacevic, the tavern owner, testified that *he offered* to pay the sum of $150 "to straighten out" the matter. He initiated and instituted the suggested bribe, even by his testimony (A: 70-71). His testimony that Gill had requested $500 and then agreed to accept the lower figure of $300 was denied by Gill, who, in addition

to testifying to his years of commendable police service, produced reputable character witnesses on his behalf.

On the other hand, Mr. Kovacevic had been arrested on July 12, 1971—even after the alleged events which gave rise to the instant charge—and was charged by Officer Reddon with *again* selling liquor to a minor, this time to an 18 year old girl (A: 110). He was brought into the Austin Police Station where he had a conversation with Commander Foley, who decided, after he evaluated all of the circumstances, not to place a charge against the tavern owner. But it was demonstrated that Mr. Kovacevic was "mad" (A: 106-9); and possibly this motivated his false accusations.

Considering the many discrepancies in the testimony of the government witnesses and considering the possibility that the government witness Dino Sanichas could have been on a shake-down frolic of his own,[9] the case was not one where the evidence was overwhelming against the defendants.

But the Seventh Circuit decided the issue here on the authority of its en banc decision in *United States* v. *Silvern*, 484 F.2d 879 (1973).[10] A divided court held the Allen charge to be controlling in *Silvern*, but Chief Judge Swygert dissented because the district judge refused to follow the Seventh Circuit mandate in *United States* v.

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[9] He learned that the police were not going to place a charge against the tavern owner, that they were going to give him a pass. He could well have represented to Kovacevic that he was going to give money to the police, when in fact he kept it himself.

[10] *Silvern* has also laid down rules for guidance of the Seventh Circuit trial judges, but admonished more specifically that deviation from the suggested charge to be given to a deadlocked jury would result in reversal.

Brown, 411 F.2d 930 (1969), where the *Brown* court laid down rules for the guidance of trial judges within its circuit.

Chief Judge Swygert pointed out that *Silvern*, and therefore, *Gill*, grounded on *Silvern*, was in conflict with the First, Fifth and Tenth circuits: *United States* v. *Flannery*, 451 F.2d 880 (1 Cir. 1971); *Thaggard* v. *United States*, 354 F.2d 735 (5 Cir. 1966); and *Burroughs* v. *United States*, 365 F.2d 431 (10 Cir. 1966).

Before giving the supplementary instruction to the jury which had deliberated for some 10 hours—and had not indicated in any way that it was deadlocked or hung—as a preamble the judge stated:

> In your job of determining the facts, you are reminded before each of you was accepted and sworn to act as a juror, you were asked questions regarding your competency, qualifications, fairness and freedom from prejudice or sympathy. Neither prejudice nor sympathy should play any part in your deliberations. On the faith of those answers you were accepted as jurors by the parties. Therefore, those answers are as binding on each of you now as they were then, and should remain so until you are discharged from consideration of the case. (4: 706)

And after the trial court gave what is claimed to be the offending dynamite charge, the trial judge concluded with a prologue:

> In determining the guilt or innocence of a defendant, you should not give any consideration to the matter of punishment. This question is exclusively my responsibility. (4: 708-9)

In this connection, the Court of Appeals agreed with the petitioners

> ". . . that there was no particular reason why the jurors should have been reminded of their oath at the time the supplementary instruction was given or for the judge to repeat what he had told them prior to the time the jury started their deliberations: that it was his exclusive responsibility to decide punishment. The defendants argue that it is possible for a juror to have gained the impression that if he voted not guilty, or if he did not change his vote, he would not be true to his oath. It is also argued that by singling out and repeating the instruction on punishment the judge meant for the jurors to convict and that he would take care of the punishment and possibly give favorable consideration to the defendants regarding their sentences. Such arguments, however, are speculative.
>
> The question of coerciveness is close, but on balance we are constrained to hold that these statements do not require reversal, particularly in light of the decision in *Silvern.*" App. *infra,* p. 12; *U.S. Gill,* 490 F.2d at .....

But if "the question of coerciveness is close . . ." and if the jury were unable to agree after 10 hours of deliberation on factual disputations which were head-on-head simple, but nonetheless extremely difficult of easy resolution by the trier of the facts, such conceded "coerciveness" should compel reversal in order to guarantee fairness of the jury deliberation processes.

Perhaps this precise issue will not rise again in the Seventh Circuit because of the specific warnings in *Silvern* to the trial judges of the Seventh Circuit. But petitioners Gill and Fahey have had their constitutional rights to a fair trial by jury in accordance with the Sixth Amendment violated.

And further, considering the wide disparity—and even conflicting holdings—amongst all of the circuits, this Court

should grant the writ and speak again after 78 years since *Allen*.

CONCLUSION

Wherefore, these Petitioners respectfully pray the Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JULIUS LUCIUS ECHELES
ANNA R. LAVIN
Attorneys for Petitioners,
Frank J. Gill and James Fahey

APPENDIX

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 JANUARY SESSION, 1973

Nos. 72-1689, 72-1690

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANK J. GILL and JAMES FAHEY,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 CR 414

RICHARD B. AUSTIN, *Judge.*

ARGUED FEBRUARY 14, 1973 — DECIDED DECEMBER 28, 1973

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and KILEY, *Circuit Judge.*

SWYGERT, *Chief Judge.* Defendants Frank J. Gill and James Fahey appeal from their convictions of extortion and perjury, having been found guilty of these crimes by a jury. Gill was convicted of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, and of making a

false material declaration before the grand jury in violation of 18 U.S.C. § 1623. Fahey was also convicted for the same violations. Gill received two four-year concurrent sentences and Fahey received two three-year concurrent sentences.

The evidence viewed most favorable to the Government establishes the following. Gill was a lieutenant and Fahey a sergeant with the Chicago Police Department. Stojan Kovacevic was the licensee of a combination tavern and liquor store called the Chicago-Oak Liquors. His brother, Boris, was a bartender there. Sometime in early July 1971, Chicago police officer Reddon entered the liquor store and told Kovacevic that he had sold beer to a minor. Kovacevic could not recall the sale so Officer Reddon left the store and returned shortly with the minor to whom the beer had been sold. After a conversation between Kovacevic and Reddon, Reddon left with the minor.

A short time later Lieutenant Gill and Sergeant Fahey entered the liquor store. Gill told Kovacevic that he had sold liquor to a minor. Kovacevic said he could not recall this and suggested that the officers search the minor for another identification card. Gill and Fahey then left and returned shortly and told Kovacevic that they did not find any other identification on the minor. Kovecevic said that he still did not believe it. Gill asked him what he was going to do; Kovacevic replied that he did not know. Gill then said that he would have to appear before the Liquor Commissioner. Kovecevic asked if something could be done; Gill asked what he meant. Kovacevic then offered Gill $150, but Gill countered with a demand for $500. They finally agreed on $300. Kovacevic told his brother, Boris, that he was giving the money because he feared the loss of his license as well as his business.

Constantine (Dino) Sanichas was in the tavern during the time in question and saw Fahey, with whom he was acquainted. Sanichas approached Fahey and asked what was happening. Fahey said that the owners were caught selling liquor to minors and asked Sanichas if he knew the owners. Sanichas said that he did. Fahey then asked Sanichas to talk to them and explain that "it would be $500 for the owners to be given a pass, excused." After Fahey left, Sanichas spoke with Boris and told him that the police officer wanted $500; Boris said that he couldn't pay it. Sanichas then suggested $300, to which he agreed. After Fahey had returned to the tavern, Sanichas told him, "He's willing to pay $300, to give $300 for the pass, so he won't be arrested." Fahey then told Sanichas to get the money and meet him on the corner. Fahey left. Sanichas told Boris that Fahey would accept $300, whereupon Boris produced the $300. Sanichas left the bar, met Fahey on the prearranged corner, and gave him the $300. About four to five weeks later Fahey met Sanichas and gave him $40.

Both Gill and Fahey were called before the grand jury. Gill denied asking the owner or anyone else for money when he was in the Chicago-Oak Liquors. Fahey denied receiving money from Sanichas.

Subsequently, they were jointly indicted in Count I for extortion. Gill was charged in Count II and Fahey in Count III for false declarations to the grand jury.

I

The first contention made by the defendants is that the commerce affected by the extortion was not of an interstate nature. They argue that there was no evidence that the beverages sold to the tavern and liquor store

came from a distributor or manufacturer from outside of Illinois, despite a stipulation that the beverages were manufactured in a state other than Illinois. It is maintained that the beverages, citing *Brown* v. *Houston,* 114 U.S. 622 (1885), were no longer in interstate commerce, having come to rest at the distributor's warehouse in Chicago before they were resold to Chicago-Oak Liquors.

The fallacy in the argument is that the Hobbs Act not only forbids extortion which interferes with interstate commerce but also extortion which affects interstate commerce. Congress' power to regulate interstate commerce is very broad. *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 253-58 (1946); *Wickard* v. *Filburn,* 317 U.S. 111, 118-129 (1942).

The defendants make the alternative argument that the extortion of $300 from the tavern owner had, to say the least, a *de minimis* effect on commerce. Stated differently, they say it is unreasonable to infer that the owner's depletion of funds to the extent of $300 could have affected his ability to transact business, including the purchase of liquor from out of the state. An identical argument was made in the recent case of *United States* v. *DeMet,* No. 72-1657 (7th Cir., Oct. 25, 1973). There this court, speaking through Judge Fairchild, rejected the argument:[1]

> Although King's business was primarily local, depletion of King's assets by the goods and money

[1] The author of this opinion stated a view in a prior case, *United States* v. *Amabile,* 395 F.2d 47, 54 (7th Cir. 1968), that is in opposition to those expressed by Judge Fairchild in *DeMet.* With reluctance, the author accepts Judge Fairchild's opinion in *DeMet* as the law of the circuit. *See* concurring opinion, Swygert, C.J., *United States* v. *DeMet,* sl. op. at pp. 10 and 11.

extorted, or the cessation of his business if he did not yield and his fears were realized, would tend to reduce the demand for and amount of beer and liquor moving into Illinois. The effect on interstate commerce would exist, though small by most standards, and only indirectly caused by defendant's acts.

* * *

Section 1951 clearly contemplates a full application of the commerce power. It proscribes extortion which "in any way or degree obstructs, delays, or affects commerce or the movement of any articles or commodity in commerce. . . ."

* * *

Because Congress has seen fit to exercise its full power under the commerce clause, extortionate conduct having any arguably *de minimis* effect on commerce may nevertheless be punished. Sl. op. at pp. 7-9.

Fahey raises the additional issue that the Twenty-first Amendment has precluded the enforcement of the Hobbs Act in this case since the amendment gave to the states the power to regulate traffic in intoxicants. Section 2 of the Twenty-first Amendment prohibits any state-restricted transporting or importing of liquor for use or delivery therein which crosses state lines. This state preemption in regulating liquor does not preclude the federal government from prohibiting extortion which affects interstate commerce under authority of the Commerce Clause.

II

Defendants next contend that the Government proved bribery and not extortion. They rely heavily on Stojan's testimony that he offered Gill $150 without any demand by the police officers. The offer of the $150 came after Gill had asked Stojan what he was going to do and told him that he would have to appear before the Liquor Com-

missioner. After Stojan offered $150, Gill said, "No, I will take $500." Fahey approached Sanichas and asked him to tell the owners that "it would be $500 for the owners to be given a pass, excused." The jurors could reasonably have inferred from the evidence that the money was obtained through fear of economic loss and that Stojan offered to pay the $300 because he reasonably feared that if he did not, he would be cited for liquor violations or lose his license. Extortion, not bribery, was proved. *See United States* v. *DeMet,* sl. op. at p. 6.

Defendants argue that extortion and bribery are mutually exclusive crimes and rely primarily on *United States* v. *Kubacki,* 237 F.Supp. 638, 641-42 (E.D. Pa. 1965), for this proposition. Since there is sufficient evidence for the jury to have found extortion, it is not necessary to deal with this argument.

III

Defendants allege that the trial judge failed to instruct on an essential element of the crime, namely, commerce. They say that the judge withdrew this element to be proved from the jury and made the determination himself. The defendants stipulated at trial that Stojan's distributors would testify that the liquor and beer they sold to him came from outside Illinois. The judge told the jurors that the defendants had agreed that the stipulated testimony proved that the beer and liquor came from out of state. Defendants, who never objected to the judge's statement and who never attempted to refute the stipulated testimony, argue on appeal that the judge improperly withdrew the question from the jury as to whether the liquor had been in interstate commerce. Counsel for Gill specifically approved and counsel for Fahey did not object to the following instruction:

> In reference to the requirements of the statute that commerce or the movement of any article or commodity in commerce be obstructed, delayed or affected you are hereby instructed that alcoholic beverages were shipped to various liquor distributors in Chicago, Illinois, from locations outside of the State of Illinois, and the Chicago-Oak Liquor distributors sold these alcoholic beverages to the Chicago-Oak Liquor Store in Chicago, Illinois.

It was not error for the judge to fail to define "commerce" since the defendant had agreed that the liquor sold to Stojan had come from out of state. To define "commerce" under 18 U.S.C. § 1951(b)(3) as defendants now argue would be a meaningless instruction since the jury was not called upon to make any factual determination about whether the shipment of liquor was interstate commerce. The only factual question in this regard was whether the commerce to which they had stipulated was affected by the extortion. The instructions fully covered this element of the crime.

IV

Count I of the indictment charged Gill and Fahey jointly with a violation of the Hobbs Act; Count II charged Gill with making a false material declaration to the grand jury which investigated the extortion charge: Count III charged Fahey with a similar offense. Gill made a pretrial motion for severance under Rule 8(b) of the Federal Rules of Criminal Procedure.[2] The motion also

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[2] Rule 8(b) provides:

> Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

mentioned Rule 14, Fed. R. Crim. P.[3] The motion read in part, "The defendant Gill consents to a trial of the charges contained in Counts I and II, but objects to a joint trial with Fahey which includes the charges contained in Count III." After Fahey joined in the motion, the district court denied it. Later, at the start of the trial, Gill filed a second motion for severance, claiming that the evidence to be produced at trial would place him in a position antagonistic to Fahey. He requested a separate trial. During the trial Fahey made a similar motion. Both motions were denied.

Although their briefs are far from clear, the defendants appear to argue that there was a misjoinder of counts under Rule 8(b) and that, in any event, severance should have been granted under Rule 14.

The defendants contend that the joinder of Counts I, II and III violated Rule 8(b). It is their position that the three counts do not constitute the "same series of acts or transactions" as required by the rule. Counts II and III do relate, however, to the occurrence which is the basis of the Hobbs Act violation alleged in Count I. The same evidence adduced to prove the Government's charge under Count I was used to prove Counts II and III. *See McElroy* v. *United States*, 164 U.S. 76 (1896).

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[3] Rule 14 provides:

Relief from Prejudicial Joinder. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Moreover, the alleged extortion and the denials of complicity here were as closely related as the misprision and the bank robbery charges in *United States* v. *Daddano*, 432 F.2d 1119 (7th Cir. 1970). There we held that the relationship of the two separate charges was "close enough that they may be deemed a 'series' under Rule 8(b)." 432 F.2d at 1125. Without the nexus between the alleged extortion and the separate false declarations there would have been an impermissible joinder under Rule 8(b); but Count I provided the nexus which permitted the joinder of the three counts.

This ruling, however, does not answer the question whether the joinder was so prejudicial that there should have been a severance under Rule 14. Gill contends that his trial on Count I should be severed from Count II; Fahey makes the same contention regarding Count I and Count III. They argue that it was prejudicial for the jurors to be aware of the fact that the grand jurors disbelieved each one's grand jury testimony denying involvement in the activity for which he was charged on the extortion count. They maintain that each defendant's credibility was impeached before he took the witness stand. We do not decide this important question, however, since in the motion for severance, filed by Gill and joined in by Fahey, Gill consented to being tried on Counts I and II and Fahey, by joining in the motion, consented to being tried on Counts I and III. Thus, they waived the very issue they now seek to present on appeal.

Another question which was asserted in the district court remains: whether the joinder was so prejudicial that the defendants should have been afforded separate trials under Rule 14. The main contention is that neither should have been compelled to be tried jointly since only Gill was charged in Count II and only Fahey in Count

III. It is settled that severance under Rule 14 rests in the discretion of the trial judge, subject to correction only if there has been an abuse of discretion. *United States* v. *Echeles,* 352 F.2d 892 (7th Cir. 1965). In that case we said: ". . . [A] single joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial." 352 F.2d at 896. Both defendants, while claiming prejudice by being tried together, provide little if any support in their briefs for their claim. The prejudice, if any, amounted to the fact that the jurors were aware that the codefendant was charged individually with an additional crime which was separate from the charges against the other defendant. The jurors were instructed by the judge that the evidence relating to the perjury charge against one defendant could not be used as evidence to prove any other count. Under these circumstances, we are not prepared to hold that there was an abuse of discretion in granting a severance of defendants. *United States* v. *Kahn,* 381 F.2d 824 (7th Cir. 1967).

V

Both defendants contend that the supplementary instruction given the jury after it had deliberated for some ten hours violated this court's decision in *United States* v. *Brown,* 411 F.2d 930 (7th Cir. 1969). The instruction was substantially similar to the instruction given in *United States* v. *Silvern,* No. 72-1133 (7th Cir., August 7, 1973), sl. op. at 4-5, n. 5. In *Silvern,* Judge Sprecher, speaking for the majority of the *en banc* court, held that under the circumstances of that case there was no prejudice in giving the supplemental instruction—the *Allen* charge intermeshed with the instruction suggested by the

American Bar Association and recommended in *Brown.*[4] The majority also held that any conviction thereafter would be reversed if any supplementary instruction other than the exact instruction recommended in *Brown* were given to a deadlocked jury. The instant case was tried prior to the *en banc* decision in *Silvern;* accordingly, we are bound by the decision in *Silvern* in holding that no prejudice resulted from the supplemental instruction which was substantially the same as that given in *Silvern.*

Before giving the supplementary instruction with which we were concerned in *Silvern,* the trial judge, as a preamble, stated:

> In your job of determining the facts, you are reminded before each of you was accepted and sworn to act as a juror, you were asked questions regarding your competency, qualifications, fairness and freedom from prejudice or sympathy. Neither prejudice nor sympathy should play any part in your deliberations. On the faith of those answers you were accepted as jurors by the parties. Therefore, those answers are as binding on each of you now as they were then, and should remain so until you are discharged from consideration of the case.

Then, after giving the supplementary instruction, the trial judge concluded:

> In determining the guilt or innocence of a defendant, you should not give any consideration to the matter of punishment. This question is exclusively my responsibility.

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[4] The *Allen* charge, also known as the dynamite charge, takes its name from the case of *Allen* v. *United States,* 164 U.S. 492, 501-02 (1896). The Supreme Court approved the giving of the instruction in *Allen,* but this circuit under its supervisory power held in *United States* v. *Brown,* 411 F.2d 930 (1969), that the American Bar Association standards on supplementary instructions were to be followed instead of the *Allen* charge.

We agree with the defendants that there was no particular reason why the jurors should have been reminded of their oath at the time the supplementary instruction was given or for the judge to repeat what he had told them prior to the time the jury started their deliberations: that it was his exclusive responsibility to decide punishment. The defendants argue that it is possible for a juror to have gained the impression that if he voted not guilty, or if he did not change his vote, he would not be true to his oath. It is also argued that by singling out and repeating the instruction on punishment the judge meant for the jurors to convict and that he would take care of the punishment and possibly give favorable consideration to the defendants regarding their sentences. Such arguments, however, are speculative.

The question of coerciveness is close, but on balance we are constrained to hold that these statements do not require reversal, particularly in light of the decision in *Silvern*.

VI

Gill contends that he was prejudiced by the Government's failure to turn over all of Stojan's pretrial statements as required by 18 U.S.C. § 3500. The assistant United States Attorney informed the court before the third day of trial that he had inadvertently left out one page of the section 3500 material when he had tendered the statement to defense counsel. The trial judge admonished the Government not to comment on defense counsel's inability to impeach and denied Gill's motion for a mistrial. Stojan was recalled as a witness and cross-examined. At that time the missing page was available to the defendant. We have examined the page and reviewed the cross-examination and find no prejudice to Gill's defense under the circumstances. The delay in producing the one

page of the statement was harmless error. *Rosenberg v. United States,* 360 U.S. 367, 371 (1959).

It is also contended that it was error for the trial judge to refuse to allow Gill to testify about whether he had made similar decisions in the past not to arrest minors who had purchased beverages. It is argued that this proffered testimony was affirmative evidence to prove that Gill properly exercised his discretion in not arresting the minor and not charging Stojan with a liquor violation. Whether he had made prior decisions not to arrest in similar situations was irrelevant to the question whether he extorted money on this occasion. *Cf. United States* v. *Isa,* 452 F.2d 723 (7th Cir. 1971).

Fahey argues that the Government failed to show that he had been advised by the prosecutor at the time of his grand jury testimony that he could purge himself of the allegedly false declaration by subsequently recanting. There is no duty on the Government prosecutor to attempt to get the witness to recant. Perforce, failure to show that an attempt was made is not an element of the offense. 18 U.S.C. §1623(a), (c), and (e).

The last contention raised on appeal is that the standard used by the district judge in sentencing the defendants was improper. The maximum penalty for extortion is twenty years and the maximum penalty for false declaration is five years. Gill received two four-year concurrent sentences and Fahey received two three-year concurrent sentences. The asserted improper standard was that the trial judge imposed punishment on police officers in accordance with their rank. Gill, a lieutenant, received the four-year sentence, Fahey, a sergeant, received the three-year sentence, and a patrolman sentenced about a week prior received a two-year sentence for a similar crime. The trial judge said that he felt that "only this

type of deterrent" could have an effect on future crime. Courts of appeals have no reviewing power over sentencing except perhaps in the most extraordinary circumstances; this is not such a case.

The convictions are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

March 6, 1974.

Before
Hon. Luther M. Swygert, Chief Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 72-1689, 72-1690 vs.

FRANK J. GILL and JAMES FAHEY,
Defendants-Appellants.

The appellants have filed a suggestion for a rehearing *en banc* of this appeal. The Government filed an answer on February 1, 1974.

No member of the panel or judge in regular active service has requested a vote to rehear this appeal *en banc*.